

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Sep 11, 2023**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WILLIAM C. SCHROEDER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 2:22-cv-00172-MKD

ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS

**ECF No. 6**

Before the Court is Defendant's motion to dismiss, ECF No. 6. The Court has reviewed the record and is fully informed. The motion was considered without oral argument. For the reasons set forth below, the Court grants Defendant's Motion to Dismiss.

**BACKGROUND**

**A. Procedural History**

Plaintiff, an attorney representing himself in this action, filed a Complaint alleging the limit on the size of the House of Representatives is unconstitutional.

1 ECF No. 1 at 1. Plaintiff requested the case be heard by a three-judge panel. *Id.* at

2 2. On September 19, 2022, Defendant filed a Motion to Dismiss. ECF No. 6.

### 3 **B. Summary of Allegations**

4 Plaintiff alleges that 2 U.S.C. § 2a(a), which permanently limits the House of  
5 Representatives to 435 members, violates Article I and Article II of the United  
6 States Constitution. ECF No. 1 at 1. Plaintiff alleges the limit deprives citizens of  
7 their constitutional right to equal representation in the House of Representatives  
8 and in the electoral college for the presidency. *Id.* Plaintiff further alleges the  
9 limit is inconsistent with the “one person, one vote” jurisprudence. *Id.*

### 10 **LEGAL STANDARD**

11 “A [Fed. R. Civ. P. 12(b)(1)] jurisdictional attack may be facial or factual.”  
12 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial  
13 attack, the challenger asserts that the allegations contained in a complaint are  
14 insufficient on their face to invoke federal jurisdiction.” *Id.* The reviewing court  
15 is to accept the allegations as true and draw all reasonable inferences in the  
16 plaintiff's favor “unless challenged by the defendant.” *Leite v. Crane Co.*, 749  
17 F.3d 1117, 1121 (9th Cir. 2014). For a factual attack, the movant challenges the  
18 veracity of the allegations. *Safe Air for Everyone*, 373 F.3d at 1039. “[T]he  
19 district court may review evidence beyond the complaint without converting the  
20

1 motion to dismiss into a motion for summary judgment.” *Id.* The reviewing  
2 court is not required to accept the allegations as true. *Id.*

3 “To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain  
4 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible  
5 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic*  
6 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Threadbare recitals of the  
7 elements of a cause of action, supported by mere conclusory statements, do not  
8 suffice.” *Id.* In considering a motion to dismiss for failure to state a claim, the  
9 Court must accept as true the well-pleaded factual allegations and any reasonable  
10 inference to be drawn from them, but legal conclusions are not entitled to the same  
11 assumption of truth. *Id.* A complaint must contain either direct or inferential  
12 allegations respecting all the material elements necessary to sustain recovery under  
13 some viable legal theory. *Twombly*, 550 U.S. at 562. “Factual allegations must be  
14 enough to raise a right to relief above the speculative level.” *Id.* at 555.

15 Generally, *pro se* litigants must be given the opportunity to amend their  
16 complaint to correct any deficiencies, unless it is clear that amendment would be  
17 futile. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987), *superseded by statute*  
18 *on other grounds*, 28 U.S.C. § 1915(e)(2), *as stated in Akhtar v. Mesa*, 698 F.3d  
19 1202, 1212 (9th Cir. 2012). However, *pro se* litigants who are also attorneys are  
20 not afforded liberal pleading construction, and they are not treated as proceeding

1 without counsel. *Huffman v. Lindgren*, No. 22-35471, 2023 WL 5660151, at \*3  
2 (9th Cir. Sept. 1, 2023). As Plaintiff is an attorney, he is not afforded the leeway  
3 afforded to non-attorney *pro se* litigants.

## 4 DISCUSSION

### 5 A. Jurisdiction

6 Defendant contends the Court lacks jurisdiction to decide this action,  
7 because 1) Plaintiff lacks standing; and 2) the complaint raises a nonjusticiable  
8 political question. ECF No. 6 at 6-15.

#### 9 1. Standing

10 Defendant contends Plaintiff lacks standing because he has not suffered an  
11 individualized injury, and even if he did suffer an injury, the Court cannot redress  
12 any alleged harm. *Id.* at 12-15. To demonstrate standing, a plaintiff must  
13 plausibly plead facts to establish: 1) he “suffered an injury in fact”; 2) there is “a  
14 causal connection between the injury and the conduct complained of”; and 3) it is  
15 “likely, as opposed to merely speculative, that the injury will be redressed by a  
16 favorable decision.” *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1173  
17 (9th Cir. 2018) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)  
18 (citations omitted)). Defendant raises a facial attack, contending Plaintiff’s  
19 allegations are insufficient on their face to invoke this Court’s jurisdiction; thus,  
20 the Court must accept Plaintiff’s allegations as true and draw all reasonable

1 inferences in Plaintiff's favor unless challenged by Defendant. *See Leite*, 749 F.3d  
2 at 1121.

3 First, when accepting Plaintiff's allegations as true, Plaintiff has not  
4 demonstrated an actual or imminent injury caused by the limit on the number of  
5 Representatives. The Supreme Court has "consistently held that a plaintiff raising  
6 only a generally available grievance . . . does not state an Article III case or  
7 controversy." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (quoting *Lujan*, 504  
8 U.S. at 573-74). In *Citizens for Fair Representation*, the Ninth Circuit found the  
9 plaintiffs did not have standing to pursue their claim that the large and growing  
10 size of California's electoral districts were diluting and devaluing the votes of  
11 Californian voters.<sup>1</sup> *Citizens for Fair Representation v. Padilla*, 815 F. App'x 120,  
12 123 (9th Cir. 2020) (*Citizens*). In *Citizens*, the plaintiffs alleged non-white  
13 Californians were having their votes devalued, however, the court reasoned that all  
14 votes were equally being impacted, thus voters' votes were not valued any less  
15

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16  
17 <sup>1</sup> The Court discusses *Citizens* for the purpose of setting forth an example of how  
18 the injury standard has been applied in a similar case and recognizes the  
19 unpublished decision is not binding precedent. *See Grimm v. City of Portland*, 971  
20 F.3d 1060, 1067 (9th Cir. 2020).

1 based on race. *Id.* As such, the Court found plaintiffs had raised only a generally  
2 available grievance, and they therefore lacked standing. *Id.*

3 The *Citizens* case was distinguishable from *Federal Election Commission*, a  
4 case in which the Supreme Court found the party had standing when the injury  
5 consisted of an inability to obtain information that the party believed was  
6 statutorily-required to be public information. *Fed. Election Comm'n v. Akins*, 524  
7 U.S. 11, 21 (1998). The injury in that case was not just a generally available  
8 grievance, but rather a concrete and specific harm in which a large number of  
9 voters experienced interference with voting rights conferred by law. *Id.* at 24-25.  
10 Similarly, in *Shaw*, the plaintiff had standing when voters were personally assigned  
11 to voting districts based on race. *Shaw v. Hunt*, 517 U.S. 899, 905 (1996).

12 Here, Plaintiff identifies only a generally available alleged grievance.  
13 Plaintiff contends the alleged injury is the deprivation of all citizens' rights to  
14 equal representation. ECF No. 1 at 1, 58. Plaintiff alleges that the weight of a  
15 person's vote depends upon the state in which they reside, which violates voters'  
16 rights. ECF No. 7 at 18. Plaintiff does not identify how he individually has  
17 suffered a specific and concrete harm. Plaintiff's contentions that all voters' rights  
18 are being violated by the limit, without any explanation of individual harm,  
19 supports a finding that Plaintiff has not alleged individual harm to establish  
20 standing.

1 Plaintiff contends the holding in *Rucho* demonstrates he can establish  
2 standing in this case. *Id* at 17-18. (citing *Rucho v. Common Cause*, 139 S. Ct.  
3 2484 (2019). Defendant contends Plaintiff misinterprets and misapplies *Rucho*.  
4 ECF No. 8 at 3. In *Rucho*, the Supreme Court referenced *Gill*, stating standing was  
5 addressed in *Gill*. *Rucho*, 139 S. Ct. at 2492 (citing *Gill v. Whitford*, 138 S. Ct.  
6 1916 (2018)). In *Gill*, the court held that a plaintiff asserting a partisan  
7 gerrymandering claim based on a vote dilution theory must establish they live in an  
8 allegedly “cracked” or “packed” district to establish standing. *Gill*, 138 at 1931.  
9 “Cracking” is a gerrymandering technique that divides party’s supporters among  
10 multiple districts, so they fall short of a majority in each one. *Id.* at 1924.  
11 “Packing” is a technique in which one party’s backers are concentrated in a few  
12 districts so they win by overwhelming margins. *Id.* In *Rucho*, the Supreme Court  
13 noted that the district court found standing because there was an intent to  
14 discriminate against voters from a particular political party and there were  
15 allegations of “widespread cracking and packing.” *Rucho*, 139 S. Ct. at 2492. The  
16 Supreme Court did not set forth a new analysis of standing and focused on whether  
17 the claim presented a nonjusticiable political question. As such, *Rucho* only  
18 reaffirms the *Gill* standard, which requires allegations of not only vote dilution but  
19 also residing in a “cracked” or “packed” district to establish standing. *Gill*, 138 at  
20

1 1931. Therefore, *Rucho* does not stand for Plaintiff's contention that an individual  
2 alleging injury from general vote dilution establishes standing.

3 Here, Plaintiff alleges the injury is vote dilution, but he does not contend he  
4 lives in a cracked or packed district. *See* ECF No. 1. Plaintiff cites to two  
5 elections in which presidents won the election by winning the electoral votes  
6 despite losing the popular vote. *Id.* at 47, 51. However, Plaintiff does not contend  
7 the elections were impacted by his district being "cracked" or "packed." As such,  
8 Plaintiff has not established standing under the standard set forth in *Gill* and  
9 discussed in *Rucho*.

10 Defendant further contends Plaintiff has not been injured because an  
11 increase in the number of Representatives that allows for the most equal  
12 apportionment between states would lead to Washington state having a number of  
13 representatives that totals to 2.32 percent of the House, while the current  
14 representation is 2.30 percent. ECF No. 6 at 12-13. Plaintiff's response appears to  
15 contend he, along with all other citizens, have suffered an injury because their  
16 votes are not equally weighed, in violation of "one person, one vote;" however  
17 Plaintiff offers no specific response to Defendant's contention that Plaintiff has not  
18 suffered an injury. ECF No. 7.

19 Even if Plaintiff had demonstrated an injury, Defendant contends the  
20 requested relief does not redress Plaintiff's alleged harm. ECF No. 6 at 14-15.



1 Plaintiff requests the Court declare 2 U.S.C. § 2a unconstitutional and asks the  
2 Court to direct Congress to “either create a ratio of member-per-unit-of-population  
3 applicable equally to each and every of the several States; or a sufficient overall  
4 whole number of districts to be apportioned to provide roughly equal district sizes  
5 among the States, as well as within each State, so as to give full effect to both Art.  
6 I, §2, and Art. II, § 1.” ECF No. 1 at 59.

7 Plaintiff does not set forth any explanation as to how his requested relief  
8 redresses his alleged harm. If the Court accepted that Plaintiff has been  
9 individually harmed by the alleged unequal representation in the House of  
10 Representatives, the relief must be likely to remedy the issue. *See Dutta*, 895 F.3d  
11 at 1173. Plaintiff does not explain how his requested relief is likely to provide him  
12 personally with equal voter representation. Defendant presents a scenario in which  
13 a reapportionment would result in Plaintiff’s state’s representation moving from  
14 2.3 percent to 2.32 percent of the total House. ECF No. 6 at 13. If the current  
15 representation deprives Plaintiff of equal representation, it is unclear how nearly  
16 identical representation would remedy his alleged injury.

17 Defendant also contends Plaintiff’s requested relief would require the Court  
18 to supervise complex policy decision-making, without guidance as to the  
19 applicable legal standards for the decisions. *Id.* at 14-15. An injury that lacks a  
20 judicially discoverable and manageable standard would also indicate this is a

1 nonjusticiable political question. *Rucho*, 139 S. Ct. at 2494. Plaintiff does not  
2 offer a response to Defendant's contention. ECF No. 7. Plaintiff has failed to  
3 demonstrate that his requested relief is likely to remedy his alleged harm.

4 As Plaintiff has not plausibly plead facts to establish he suffered an injury in  
5 fact, nor that a favorable decision would redress his alleged injury, Plaintiff does  
6 not have standing.

## 7 2. Political Question

8 Defendant contends Plaintiff's Complaint raises a nonjusticiable political  
9 question. *Id.* at 6-12. The Supreme Court has set forth six independent factors,  
10 any of which demonstrates the presence of a non-justiciable political question:

11 [1] a textually demonstrable constitutional commitment of the issue to  
12 a coordinate political department; or [2] a lack of judicially  
13 discoverable and manageable standards for resolving it; or [3] the  
14 impossibility of deciding without an initial policy determination of a  
15 kind clearly for nonjudicial discretion; or [4] the impossibility of a  
16 court's undertaking independent resolution without expressing lack of  
17 the respect due coordinate branches of government; or [5] an unusual  
18 need for unquestioning adherence to a political decision already made;  
19 or [6] the potentiality of embarrassment from multifarious  
20 pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962).

As the Court lacks jurisdiction to hear the claim because Plaintiff  
lacks standing, the Court declines to address whether Plaintiff's claims  
present a political question beyond our jurisdiction. The Court notes that  
Defendant contends Plaintiff's claim implicates four of the six *Baker* factors,

1 supporting a finding the claim is a nonjusticiable political question. ECF  
2 No. 6 at 7-12. Plaintiff contends the claim is a “one person, one vote” claim  
3 and is thus justiciable, ECF No. 7 at 2-3, 12, but Plaintiff’s Complaint and  
4 response largely rely on a historical summary and quotes from cases with  
5 little analysis applying precedent to the instant case. For example, Plaintiff  
6 does not address the six factors set forth in *Baker*.

### 7 **B. Failure to State a Claim**

8 Defendant also contends Plaintiff has failed to state a claim. ECF No. 6 at  
9 15-16. As the Court lacks jurisdiction to hear Plaintiff’s claims under Article III,  
10 the Court need not address whether Plaintiff has failed to state a claim.

### 11 **C. Three-Judge Panel**

12 As the Court lacks jurisdiction to hear Plaintiff’s claims under Article III,  
13 the Court must dismiss the case and need not reach the request for a three-judge  
14 panel. *See Shapiro v. McManus*, 577 U.S. 39, 44-45 (2015) (quoting *Gonzalez v.*  
15 *Automatic Emp. Credit Union*, 419 U.S. 90, 100 (1974)); *Citizens*, 815 F. App’x at  
16 124.

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Defendants’ Motion to Dismiss, **ECF No. 6**, is **GRANTED**.

19 2. Plaintiff’s Complaint, **ECF No. 1**, is **DISMISSED** without prejudice.  
20

1 The District Court Executive is directed to file this Order, enter judgment,  
2 provide copies to counsel, and **CLOSE THE FILE.**

3 DATED September 11, 2023.

4 *s/Mary K. Dimke*  
5 MARY K. DIMKE  
6 UNITED STATES DISTRICT JUDGE  
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